

REMARKS

Claims 1, 2, 5, 8, 13-15 and 17-20 stand rejected under U.S.C. §102(e) over U.S. Patent No. 6,692,495 to Zacouto. It is Appellant's position, however, that the Examiner is erroneously combining two separate embodiments of the '495 patent into a single embodiment. The first embodiment is described with reference to Figures 14 and 15 of the '495 patent. The second embodiment is shown in Figure 16. All are reproduced below:

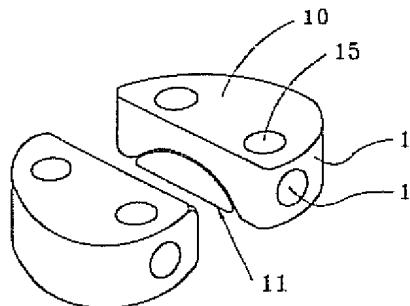


FIG.14

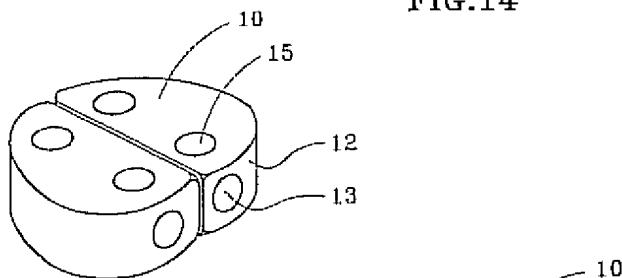


FIG.15

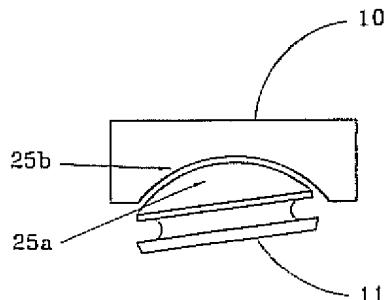


FIG.16

In the embodiment of Figures 14 and 15, Appellant concedes that two components are being coupled together according to the Zacouto reference. "With reference to FIGS. 14 and 15, the two fixators F advantageously have complementing shapes so that once they have been fitted, they can form a geometrically coherent entity, such as an all-in-one piece (FIG. 15)." ('495 Patent; 8:34-37). But in this embodiment, item 11 is a "plate" and not an articulating component. This is evident for several reasons. First, the bottom of item 11 is flat and flush with the bottom of item 10, thereby precluding any

pivoting movement.

Second, Zacouto explains that "the two plates 10, 11 and the bellows 25 (not visible) are introduced all together into the intervertebral space V." ('495 Patent; 8:21-24). This bellows 25, shown in Figure 1 of the '495 patent, for example, would go right through the plates 10, 11, further preventing articulation. Further, Zacouto states that, *in this embodiment*, "[i]t is possible that more than two fixators might be provided in each intervertebral space, for example four fixators might be provided." ('495 Patent; 8:36-40). Clearly if four such "fixators" are used articulation would be impossible. Thus, in summary, although Zacouto does disclose component assembly, it is the assembly of "fixator" components as opposed to articulating components.

Turning to the second embodiment of Zacouto shown in Figure 16, Zacouto states that "[t]he moving and/or deformable elements of the intermediate element may be produced in some form other than the form of bellows. Thus, as depicted diagrammatically in FIG. 16, it is possible to use complementary curved (convex or concave) surfaces 25a, 25b capable of sliding one on the other in a sliding space." ('495 Patent; 8:45+) However, in this embodiment, the plate 10 (in Figure 16) is disclosed as having been assembled in a disc space; rather, it is seen, and would be understood to the person of skill in the art, as a unitary piece. *The fact that Zacouto uses numerical references 10 and 11 (for example) in Figures 14-16 is irrelevant.* Zacouto calls many different components parts "10" or "11" (See Figures 1 and 18)

Thus, the embodiment of Figures 14, 15 of Zacouto, and the embodiment of Figure 16, are mutually exclusive and should not be combined for the purposes of rejection. Zacouto does not set forth an enabling, unified disclosure that teaches each and every element of Appellant's invention as claimed. Accordingly, *prima facie* anticipation has not been established. Anticipation may be established only when a single prior art reference discloses, expressly or under principles of inherency, each and every element of a claimed invention. RCA Corp. v. Applied Digital Data Systems, 730 F.2d 1440, 1444, 221 USPQ 385, 388 (Fed. Cir. 1984). Moreover, anticipation requires the presence of all elements of a claimed invention as arranged in the claim, such that a disclosure "that 'almost' meets that standard does not 'anticipate'." Connell v. Sears, Roebuck Co., 722 F.2d 1542, 1548, 220 USPQ 193, 198 (Fed. Cir. 1983).

Claims 1, 7, 8, 18 and 20 stand rejected under U.S.C. §102(e) over published U.S. Patent Application Serial No. 2004/0254644 to Taylor. However, claim 1 requires that *the surface of the endplate is formed with separate components*, which is not true in Taylor. Although Figure 19 of Taylor does show a “dome element” (see below), the *surface* of the dome element is not made from separate components, thereby negating *prima facie* anticipation. Claim 18 has also been amended to clarify that it is the articulating surface which is effectively assembled.

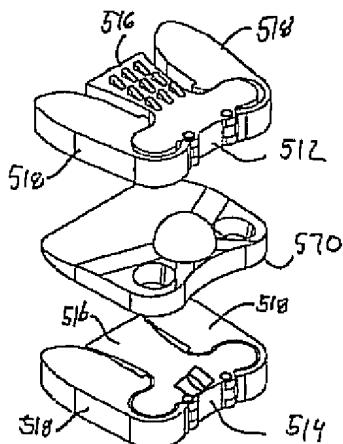


Fig. 19

Claims 18-20 stand rejected under U.S.C. §102(e) over U.S. Patent No. 6,468,311 to Boyd. However, since Boyd resides in a fusion device, there are no articulating surfaces and no articulation. To one of skill in art the device of Boyd is a cage and not an artificial disc replacement (ADR).

Respectfully submitted,

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